

IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA,

Appellant,

v.

CASE NO. 75,074

PSC DOCKET NO. 881499-EI

MICHAEL McK. WILSON, ETC., ET AL.,

Appellees.

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

**ANSWER BRIEF OF
APPELLEE, THE FLORIDA INDUSTRIAL POWER USERS GROUP**

John W. McWhirter, Jr.
Fla. Bar No. 53905
Vicki Gordon Kaufman
Fla. Bar No. 286672
Lawson, McWhirter, Grandoff
and Reeves
522 E. Park Avenue, Suite 200
Tallahassee, Florida 32301
9041222-2525

Attorneys for the Florida
Industrial Power Users Group

TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF CITATIONS.....	i i
PRELIMINARY STATEMENT.....	.1
STATEMENT OF THE CASE.....	.2
STATEMENT OF THE FACTS.....	3
SUMMARY OF ARGUMENT.....	.7
ARGUMENT	
THE PROCESS FOLLOWED BY THE COMMISSION IN APPROVING TECO'S SUPPLEMENTAL SERVICE RIDER TARIFF PROTECTED THE RIGHTS OF ALL CUSTOMERS.....	9
CONCLUSION.....	.19
CERTIFICATE OF SERVICE.....	.20
APPENDIX.....	.21

TABLE OF CITATIONS

<u>Cases</u>	<u>Page No.</u>
<u>Citizens of Florida v. Mayo</u> , 333 So.2d 1 (Fla. 1976)	10
<u>Florida Power Corporation v. Hawkins</u> , 367 So.2d 1011 (Fla. 1979)	10
<u>Gulf Power Company v. Florida Public Service Commission</u> . 487 So.2d 1036 (Fla. 1986)	17
 <u>Florida Statutes</u>	
Chapter 120. Florida Statutes (1987)	9
Section 366.06(1) (1987)	9
Section 366.06(3) (1987)	9
Section 366.07 (1987)	12
 <u>Administrative Orders</u>	
FPSC Docket No. 74680-CI, Order No. 9273	14
FPSC Docket No. 890001-EI, Order No. 22058	14
FPSC Docket No. 881499-EI, Order No. 22093	2.13. 19
FPSC Docket No. 881499-EI, Order No. 22131	2
FPSC Docket No. 900001-EI, Order No. 22581	15.16
 <u>Florida Administrative Code</u>	
Rule No. 25-6.0438(3)(b)	4
Rule No. 25-14.003	6
Rule No. 25-22.029	10
Rule No. 25-25.9002(8)	11

PRELIMINARY STATEMENT

The following abbreviations are used in this brief. Appellee, Florida Public Service Commission, is referred to as the Commission. Appellee, Tampa Electric Company, is referred to as TECO. Appellee, Florida Industrial Power Users Group, is referred to as FIPUG. Appellant, Office of the Public Counsel, is referred to as OPC. References to the Appendix of this brief are designated (A-). Citations to the Appendix of OPC's Initial Brief are designated (OPC A-). References to the Record on Appeal are designated (ROA-).

STATEMENT OF THE CASE

This case involves OPC's appeal of the Commission's final Order No. 22093 which treated OPC's Protest and Request for Hearing in regard to TECO's supplemental service rider-interruptible tariff filing as a complaint and which apprised OPC of its right to a hearing on such complaint. (A-5-9). FIPUG generally accepts OPC's Statement of the Case and Facts insofar as it sets out the procedure followed by the Commission in this case. FIPUG moved to intervene in this docket (ROA-27-29) and the Commission granted FIPUG's petition to intervene in Order No. 22131. (ROA-35).

STATEMENT OF THE FACTS

IMC Fertilizer, Inc. (IMC), is a large industrial customer of TECO. IMC and others in the FIPUG group entered into a written contract with TECO in January 1989 to receive part of their service under a newly approved TECO tariff schedule called the Supplemental Service Rider for interruptible service (SSR). (OPC A-16,19). Simply stated, the terms of the new rate schedule offered customers who would take more electricity from TECO the benefit of 80% of TECO's fuel cost savings. The fuel cost savings were projected to be available to TECO for a period of one or two years because the current market price for spot coal was cheaper than the price TECO pays for the coal it buys under contract.

To qualify for the credit, IMC and others had to agree to pay a higher customer charge, had to agree that they would get no fuel cost reduction unless they used more electricity than had been purchased in the previous year, and had to agree to continue to pay the non-fuel related base charges charged to all interruptible customers.^{1/} Most importantly, the new rate was only available to customers who would agree to have their

^{1/} This charge is 1.34 per kilowatt hour for IS-1 customers and 1.71¢ per kilowatt hour for 1-3 customers. (OPC A-45).

electric service interrupted if TECQ needed to divert its energy to meet the demands of its firm customers.^{2/}

A rudimentary understanding of electric rates is important to the evaluation of the legal arguments presented in this brief. Electric companies essentially have two kinds of cost - fixed costs which arise because they stand ready to serve and variable costs.

Examples of fixed costs are ad valorem taxes, interest costs on the debt incurred to build the electric system, and the cost to recover the utility's investment in electric plant over its useful life. These costs are present even if the utility sells no electricity. As OPC points out, these costs are recovered through base rate charges. OQC Initial Brief at 19.

Variable costs are those costs which change in proportion to the amount of electricity sold. Fuel is the utility's primary variable cost. In TECO's case, it burns coal to make steam which turns electric generating turbines that produce electric energy.

The fixed and variable costs are charged to the customers separately as base charges designed primarily to recover fixed

^{2/} Rule 25-6.0438(3)(b), Florida Administrative Code, defines "interruptible electric service" as electric service that can be limited or interrupted, either automatically or manually solely at the option of the utility. Customers receiving service under interruptible tariffs may have their service interrupted whenever the energy supplied to them by the utility is needed for customers which contract for firm electric service.

cost and energy charges designed primarily to recover variable costs. Because variable costs change with consumption, the more electricity a customer consumes, the more energy charges he pays. The largest variable cost, fuel, is recovered from customers through a fuel adjustment charge.

The Commission approves all TECO's charges. As pointed out in the OPC Initial Brief at 19, base charges are approved periodically in general rate cases. Because fuel costs are highly volatile, they are examined at least twice a year by the Commission and reset every six months. Public hearings are held in August to determine the fuel charges that will be imposed on customers during the following October to March period. In February, public hearings are held to determine the costs that will be charged during the succeeding April to September period. If the utility has charged its customers too much or too little during any six-month period, the difference, plus interest, is included in the charges which are imposed during the next six months. Frequently, hearings are held at other times to provide for mid-course corrections when fuel costs and the prices currently being charged to customers get too far out of line.

The SSR tariff went into effect on January 1, 1989. IMC and others agreed to change their operations to use more TECO-generated energy. Between January 1, 1989 and September 30, 1989, TECO collected \$3,294,878.00 more in base charges from IMC and others under the new tariff than it had collected from sales to these customers in the previous year. (OPC A-45).

It also collected several million dollars in fuel charges from the SSR customers. Because TECO was able to burn lower priced spot coal to meet this demand, the price these customers paid for fuel was \$1,216,224 less than it would have been under the IS-1 or IS-3 fuel cost recovery tariff.

TECO collected all of its fuel costs and over \$3 million^{3/} more to cover its fixed costs than it would have collected without the new rate. If the \$3 million base charge collected resulted in overearnings to TECO in 1989, all customers would benefit because this sum plus interest would be refunded to all customers under the provisions of rule 25-14.003, Florida Administrative Code. If TECO was not covering its authorized return in 1989, all customers benefit from the \$3 million payment because it postponed the filing of a TECO general rate increase. There is no suggestion by OPC that all customers failed to benefit from this additional base revenue to TECO for new sales brought about by the SSR tariff.

^{3/} The amount collected in base charges based on the customer's additional electric demand is not included in this sum but would increase it substantially.

SUMMARY OF ARGUMENT

OPC's legal argument is procedural in nature. It is aimed at fuel cost recovery. The brief would receive the applause of medieval theologians and Talmudic scholars for its arcane complexity. In simple terms, OPC says that firm customers were not given an opportunity to complain about the fact that they would only receive 20% of the fuel cost savings brought about by new sales in 1989. In addition, theoretically, if TECO was mistaken and the price of spot coal turned out to be higher than the contract price of coal rather than lower as anticipated, the firm customer might be disadvantaged.

The problem with the OPC argument is that it focuses on the way base rate charges are changed rather than fuel cost charges. The only change in base rate charges made by SSR was to create a new customer charge of \$200.00 for the customers who voluntarily opted for the new tariff. This is new revenue to TECO and does not change the prices charged to any other customers. The OPC argument addresses possible changes in fuel cost. OPC has a clear point of entry to challenge the allocation of these costs at least twice a year in fuel proceedings and more frequently, if necessary, for mid-course corrections. Any past mistakes can be corrected at these hearings by requiring TECO to refund any inappropriate past overcharges plus interest.

OPC alleges that the interests he represents have been harmed because of the procedure the Commission used in approving TECO's tariff. However, the Commission's tariff

approval procedures are necessary *to* balance the interests of consumers while still permitting legitimate tariffs to take effect without regulatory lag. An examination of the remedies available to QPC demonstrates that QPC had several avenues available to challenge the tariff about which he complains.

Contrary *to* OPC's position, no harm has occurred *to* the interests he represents. A legitimate tariff has expeditiously gone into effect while at the same time concerned persons have been provided with several proceedings in which to raise, address, and remedy any alleged problems with the underlying basis of the tariff and its monetary operation and effect.

ARGUMENT

THE PROCESS FOLLOWED BY THE COMMISSION IN APPROVING TECO'S SUPPLEMENTAL SERVICE RIDER TARIFF PROTECTED THE RIGHTS OF ALL CUSTOMERS.

The thrust of OPC's argument is that firm customers have been harmed because the Commission did not hold a hearing on TECO's supplemental service rider tariff prior to the tariff becoming effective. OPC attempts to bolster his position with convoluted and confusing arguments related to the file-and-suspend statute, section 366.06(3), Florida Statutes (1987), and its interaction and relationship to the Administrative Procedures Act, Chapter 120, Florida Statutes (1987).

However, OPC's interests have not been harmed by the process followed by the Commission in approving TECO's tariff. Rather the process followed by the Commission in this case balanced the interests of all affected persons - consumers and the utility - by allowing the tariff to be implemented expeditiously while still providing OPC with several points of entry to address TECO's tariff.

In this instance, as in the case of many of the other tariff filings which the Commission continually receives, the supplemental service rider tariff became effective without prior hearing.^{4/} The Commission's procedure for approving

^{4/} This is not to say that the tariff became effective simply as a result of TECO's filing with no Commission review. The Commission reviewed the tariff and determined that it was just and reasonable pursuant to its statutory duty under section 366.06(1), Florida Statutes (1987).

tariffs, or allowing them to become effective if not suspended, is necessary in order to prevent what numerous Florida Supreme Court opinions have characterized as "regulatory lag." See, i.e., Florida Power Corporation v. Hawkins, 367 So.2d 1011, 1013 (Fla. 1979); Citizens of Florida v. Mayo, 333 So.2d 1, 4 (Fla. 1976).

If every tariff filing had to be noticed prior to implementation and fourteen (14) days^{5/} provided for a protest, as suggested by OPC, the time between filing and implementation, even assuming no protest, would add at least thirty to forty-five days to every tariff filing. These wasted days before tariff effectiveness would occur just because of the lag in receipt of the tariff and publication of notice. Thus, the procedure OPC suggests would prevent the operation of a legitimate tariff to which no one objects for a significant period of time. Such a process could prevent rate reductions, which are effectuated through tariff filings, from taking effect until at least the end of the protest period. Surely, this would not be in the interest of the persons OPC represents.

The "regulatory lag" which would attend a protest and request for hearing would, of course, be even greater. It is

^{5/} When the Commission issues a notice of proposed agency action, its rules require that it give parties fourteen (14) days from service of the notice to request a hearing. Rule 25-22.029, Florida Administrative Code. As a matter of practice, the Commission generally allows twenty-one (21) days.

uncontroverted that requests for hearing, with attendant discovery, hearing time, post-hearing filings, and final order preparation time frequently take many months. This is especially true given the Commission's heavy hearing schedule. Thus, the implementation of a legitimate tariff could be unduly delayed under the process OPC suggests.

The majority of tariff offerings do not affect rates at all.^{6/} Tariffs often change service offerings or conditions of service. OPC's argument, carried to its logical extreme, would unnecessarily delay new service offerings or conditions of service beneficial to consumers. It would delay such offerings even though, in the majority of instances, no hearing would be requested.

It is also important to recognize that many tariff changes, whether such changes are related to rates or to service offerings, arise because of the quickly changing circumstances attendant to the utility industry. Changes in the prices of oil or gas may occur rapidly necessitating tariff changes which must be dealt with expeditiously. The delay attendant to prior notice and hearing may well render

^{6/} Rule 25-25.9002(8), Florida Administrative Code, defines "tariff" as the:

assembled volume containing the "rules," "regulations," "rate schedules," "standard forms," "contracts," and other material required by these regulations as filed with the Commission.

tariffs useless by the time they are "approved" under the procedure OPC advocates.

The above discussion does not mean that affected parties have no opportunity to object to a tariff filing. It simply means that this right must be balanced against the important regulatory objective of implementing tariffs without unjustified delay.

This balance is struck in section 366.07, Florida Statutes (1987). This section provides:

Rates; adjustment. - Whenever the commission, after public hearing either upon its own motion or upon complaint, shall find the rates, rentals, charges or classifications, or any of them, proposed, demanded, observed, charged or collected by any public utility for any service, or in connection therewith, or the rules, regulations, measurements, practices or contracts, or any of them, relating thereto, are unjust, unreasonable, insufficient, or unjustly discriminatory or preferential, or in anywise in violation of law, or any service is inadequate or cannot be obtained, the commission shall determine and by order fix the fair and reasonable rates, rentals, charges or classifications, and reasonable rules, regulations, measurements, practices, contracts or service, to be imposed, observed, furnished or followed in the future.

Emphasis supplied.

Section 366.07 is extremely broad and allows OPC, or anyone else, to challenge any utility tariff at any time for any legitimate reason. This section does not limit the challenge to a specified period prior to the tariff's effective date, such as a fourteen or twenty-one day notice period.

In fact, a complaint proceeding was the very way in which the Commission treated OPC's Protest and Request for Hearing:

[W]e will treat Public Counsel's Protest and Request for Hearing as a complaint attacking the prospective application of the tariff and will afford a hearing on it. TECO is thus directed to respond to Public Counsel's complaint within twenty days from the date of this Order.

Order No. 22093 at 3; (OPC A-7). Had OPC availed himself of the opportunity for a hearing on his protest, he would have had an evidentiary hearing in regard to his concerns over TECO's tariff. Public Counsel chose to disregard this remedy and seek review in this Court.

OPC suggests that firm customers have been monetarily harmed by the tariff's implementation. However, this harm does not manifest itself through the operation of the tariff. Any alleged harm occurs in the way TECO recovers the credits from ratepayers.

OPC alleges that such "harm" occurs to firm customers due to "increased fuel cost recovery charges to all customers to reimburse the utility for credits granted under the service rider." OPC Initial Brief at 2. See also, OPC Initial brief at 15. Credits flowing from the tariff are deducted from fuel revenues when TECO's fuel cost recovery factor is calculated. Therefore, OPC argues that customers pay increased fuel cost recovery charges. OPC claims that this recovery of the credits through the fuel adjustment mechanism is not provided for in the tariff.

However, the mechanics of how the SSR tariff operates and of how credits are treated for cost recovery purposes are issues which are appropriately raised in the Commission's ongoing fuel cost recovery docket. The Commission holds semiannual fuel cost recovery hearings in which the utilities estimate future fuel charges and "true up" projected fuel charges from prior periods based on actual experience.⁷¹ During these hearings, the Commission considers fuel adjustment factors and any party may raise and have a hearing on any issues related to fuel cost recovery. See, i.e., Order No. 22058, Docket No. 890001-El. (A-1-10). OPC routinely participates in the fuel cost recovery hearings.

The fuel cost recovery proceeding and resulting order implement any monetary change resulting from TECO's tariff approval. All adjustments relating to utility fuel revenues and expenses are made in the fuel adjustment docket, in which the fuel adjustment factor is determined. Any credits resulting from the supplemental service rider which TECO deducts from fuel revenues must be reported in TECO's filings in that docket. It is the fuel cost recovery docket and

⁷¹ For example, in the order entered as a result of the August 1989 fuel adjustment hearing, Order No. 22058, (A-1-10), the Commission determined the final fuel adjustment true-up figures for October 1988 through March 1989, determined the estimated fuel adjustment true-up figures for April 1989 through September 1989, and set the proposed fuel adjustment factors for October 1989 through March 1990. As Order No. 22058 notes, these factors are set as part of the Commission's continuing fuel cost recovery proceedings. Order No. 22058 at 1 (A-1). This process was first approved by the Commission in Order No. 9273.

subsequent order which results in lower revenues due to the credits, not the order of tariff approval which OPC appeals here. OPC recognizes this and states: "Credits given interruptible customers were treated as a reduction to TECO's fuel revenues in the fuel cost recovery docket." OPC Initial Brief at 2, emphasis supplied.

The supplemental service rider tariff went into effect on January 1, 1989. (OPC A-19-20). Thus, TECO reported any credits on its monthly fuel filings beginning in January 1989. OPC could have raised the issue of the treatment of the tariff credits at the February 1989 fuel cost recovery hearing and/or at the August 1989 hearing. Had OPC identified the recovery mechanism for the credit as an issue, a hearing would have been provided in the previous fuel adjustment dockets.

Even though OPC failed to raise the issue of TECO's treatment of the credit at two previous fuel adjustment hearings, he did raise it at the February 1990 fuel adjustment hearing. OPC requested that the Commission order TECO to stop reducing fuel revenues by the credits and requested a refund of past credits. Docket No. 900001-EI, Order No. 22581 at 27-28 (A-13-14), OPC framed the issue and his position in the fuel adjustment docket as follows:

7i. ISSUE: Has TECO been authorized to reduce its reported fuel cost recovery revenues to recognize credits given

interruptible customers pursuant to its supplemental service rider tariff? (OPC).^{8/}

. . .

OPC: TECO has been reducing its reported fuel revenues by credits given interruptibles pursuant to the [supplemental] service [rider]. The tariff was approved by Staff and does not contain any provisions allowing for recovery of the credits from all customers through the fuel cost recovery docket. There are no orders in the fuel docket or elsewhere that permit such treatment. TECO should be ordered to refund credits claimed thus far as reductions to fuel revenues for past periods and ordered to cease the practice for future periods.

Prehearing Order No. 22581 at 27-28. (A-13-14).

The Commission has the authority to review past and future fuel adjustment charges and order a refund of past charges where necessary. Fuel adjustment proceedings, like the Commission's tariff approval process, are designed to prevent regulatory lag. Thus, the Commission retains continuing jurisdiction over the charges collected in the fuel adjustment proceedings.

As this Court has stated:

Fuel adjustment charges are authorized to compensate for utilities' fluctuating fuel expenses. The fuel adjustment proceeding is a continuous proceeding and operates to a utility's benefit by eliminating regulatory lag. This authorization to collect fuel costs close to the time they are incurred should not be used to divest the commission of the jurisdiction and

^{8/} The designation (OPC) means that this is an issue raised by the Office of Public Counsel in this docket.

power to review the prudence of these costs.

Gulf Power Company v. Florida Public Service Commission, 487 So.2d 1036, 1037 (Fla. 1986). In Gulf Power, this Court affirmed a Commission refund of two million dollars based on past managerial imprudence. If the Commission were to find in the fuel cost recovery docket that TECO was improperly passing the supplemental service rider credit through the fuel adjustment clause without authority, thus causing increased fuel recovery charges, the Commission has the ongoing jurisdiction to fashion a remedy.

In fact, the Commission did not agree with OPC's position in the recent fuel adjustment proceeding and voted from the bench on February 22, 1990 that TECO was authorized to reduce its reported fuel revenues to recognize the supplemental service rider credits. However, the Commission's vote is not what is at issue here. What is critical is that OPC was provided with a hearing opportunity.?' If he had prevailed, the harm which he alleged occurred could have been alleviated - OPC has had his point of entry.

Despite OPC's strenuous protestations to the contrary, the interests he purports to serve have not been harmed by the process utilized here. OPC had the opportunity to utilize the

^{9/} It is interesting to note that though OPC could have presented testimony on this issue at the hearing which he has so vociferously requested, he presented no evidence but merely orally argued his position on the supplemental service rider to the Commission.

complaint process and the fuel adjustment process to challenge TECO's tariff. OPC had remedies available before the Commission which could redress any alleged harm to customers who did not have a hearing prior to the supplemental service rider tariff approval. The Commission has successfully balanced and protected the interests of all concerned and its order approving TECO's supplemental service rider tariff should be affirmed.

Finally, IMC and other customers relied in good faith on the SSR tariff which the Commission approved and which was therefore presumptively valid. IMC and others fulfilled their obligations under the terms of the SSR tariff and received credits For doing so. If the Court should find that the Commission committed a procedural impropriety, the customers who relied on the Commission's action should not be prejudiced. If this Court does find procedural error, it should protect these customers from harm by applying any decision prospectively only.

COWCLUSION

For the foregoing reasons, FIPUG requests that Order No. 22093 issued by the Florida Public Service Commission in Docket No. 881499-EI be affirmed.

Respectfully submitted,

Vicki Gordon Kaufman

John W. McWhirter, Jr.
Fla. Bar No. 53905
Vicki Gordon Kaufman
Fla. Bar No. 286672
Lawson, McWhirter, Grandoff
and Reeves
522 E. Park Avenue, Ste. 200
Tallahassee, Florida 32301
9041222-2525

Attorneys for the Florida
Industrial Power Users Group

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Answer Brief of Appellee, Florida Industrial Power Users Group, and Appendix have been furnished by U.S. mail to the following parties of record, this 26th day of February, 1990.

Susan Clark, General Counsel
David E. Smith, Director
Division of Appeals
Fla. Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0563

Lee L. Willis
James D. Beasley
Ausley, McMullen, McGehee,
Carothers and Proctor
Post Office Box 391
Tallahassee, FL 32302

Jack Shreve, Public Counsel
John Roger Lowe
Office of the Public Counsel
c/o Florida House of
Representatives
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400

Vicki Gordon Kaufman
Vicki Gordon Kaufman